BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SIDNEY WAYNE LANG	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,039,433 &
LEGGETT & PLATT INC.	)	1,040,426
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and respondent appeal the November 3, 2009, Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was denied an award in Docket No. 1,039,433 with an injury date of October 25, 2007, but awarded a 5 percent whole body functional disability, followed by a 55 percent permanent partial general (work) disability in Docket No. 1,040,426 with a date of accident on May 22, 2008.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Phillip D. Greathouse of Joplin, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on February 2, 2010.

ISSUES

1. Did the ALJ err in determining that the last act necessary to complete claimant's employment agreement with respondent occurred in Kansas and the alleged injuries and claims are, therefore, subject to the Kansas Workers Compensation Act? Respondent argues that the actions of claimant while in Carthage, Missouri, resulted in the completion of the contract. The actions of claimant in Kansas were preliminary at best. Claimant contends the conversation during the telephone call

to his home in Baxter Springs, Kansas, was the last act necessary to finalize the employment contract.

2. Did the ALJ err in determining that claimant failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent in Docket No. 1,039,433 with an alleged accident date of October 25, 2007?

3. If the ALJ did err in failing to award claimant benefits for the alleged injury on October 25, 2007, what is the nature and extent of the injuries suffered on that date?

4. What is the nature and extent of the injuries suffered on May 22, 2008, in Docket No. 1,040,426?

FINDINGS OF FACT

Respondent is a wire mill facility in Carthage, Missouri, manufacturing components for mattresses and box springs. Claimant filled out an employment application in Carthage on June 25, 1997, after being advised by his nephew that respondent was hiring. Claimant was living in Baxter Springs, Kansas, at that time. At some point, claimant participated in a job interview with Terry White, respondent's plant superintendent. Claimant testified that, during the interview, he was offered a job, but declined as he still had to undergo a drug test.[1] Mr. White acknowledged that an applicant would be offered the job during the interview. If an applicant declined, then Mr. White would not send him or her for a drug test as the expense was too great to waste on an applicant not interested in the job. Claimant was also sent for a physical. He passed both the drug test and the physical. Claimant testified that he still had not been offered a job. Claimant was called at his home in Baxter Springs, Kansas, and advised that he had passed the drug test and physical. Claimant contends it was during this phone conversation that he was offered the job and he accepted. As the result of the telephone call, claimant went to respondent's plant in Carthage, went through orientation and filled out incidental paperwork. Claimant began working for respondent on January 30, 1998.

Mr. White testified that the information about whether a job applicant passed the drug test and physical would be provided by the benefits coordinator during a telephone conversation with the potential employee. At the time of claimant's application, the benefits coordinator was Debbie Wooldridge. Ms. Wooldridge did not have the authority to hire or

[1] Claimant later testified that at the time that he took the drug test, respondent had not offered him a job. (See R.H. Trans. at 11.)

fire people. She would have been the one to call claimant regarding the results of the drug test and physical. Additionally, if a person was hired by respondent, the employee would have to pass the drug test and the physical and successfully go through orientation, at which time the individual would be hired. Mr. White testified that claimant would not be hired until the orientation was completed. As a part of the orientation, claimant signed a document called the Employee Invention and Confidentiality Agreement on January 30, 1998. This document, marked as Exhibit 5 to the regular hearing, was signed while claimant was in Carthage. Claimant understood that he had to sign the agreement before he could go to work for respondent.

Claimant worked for respondent until June 17, 2007, when there was a layoff due to a work slowdown. Claimant was to be laid off work for one week, but he was called back on June 21, 2007. Claimant filed for unemployment. Claimant contends the layoff was for an undetermined length of time and he may have never gone back to work for respondent. Mr. White testified that the layoff was intended to be temporary. It was initially to be for one week, but claimant was called back early. When claimant was called back to work, the call went to his home in Kansas. However, claimant was not asked to fill out any paperwork at the call-back, his medical and insurance benefits continued during the time he was laid off and claimant was not required to take a drug test or physical or go through orientation. Claimant simply returned to his job with respondent.

Benjamin Hensley, respondent's plant superintendent in 2007, was the person who called claimant after the layoff. Mr. Hensley testified that the layoff was intended to be temporary. A Notice from Mr. Hensley dated June 14, 2007, states that the employees in claimant's department would not work the week of June 17, 2007, but they would return to work at their normal shifts the week of June 24, 2007.[2] Mr. Hensley stated that the employees were advised to file for unemployment benefits in order to get a required one-week waiting period out of the way.

Claimant was working his regular job in Missouri on October 25, 2007, when he bent over and picked up a heavy pair of hydraulic cutters. Claimant had to lean over a safety rail to cut the wire. As claimant twisted into an awkward position to cut the wire, he felt immediate pain in his low back with pain radiating into his right leg. Claimant told a fellow worker of the injury, and one week later, on November 1, 2007, claimant advised his foreman, Jeff Baker, of the accident. However, an Employee Accident Statement form filled out by claimant indicates an accident on October 25, 2007, with the following description of the accident: "Not sure what happened. Went home after work and felt pain in back getting out of truck".[3] This form was filled out and signed by claimant. A Wire

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[2] Hensley Depo., Ex. 2.

[3] R.H. Trans., Ex. 7.

Group Incident Investigation Report dated November 1, 2007, was prepared when claimant reported the accident. In describing how the accident occurred, claimant wrote "not sure, but I think it was large diam. rod."[4] This form was also signed by claimant.

Claimant was referred to Occumed on that date and was seen by Rick Haggard, D.O. Claimant was provided muscle relaxants and pain pills. Medical records from Dr. Haggard dated November 1, 2007, indicate that claimant had pain in his right low back after riding home and recalled difficulty during his work shift. Claimant was returned to his regular job, although the pain in his right lower back and right hip was more severe. Claimant returned to Occumed one week later and was sent for x-rays. The x-rays displayed arthritis. Claimant was not referred for further treatment by Occumed.

Claimant went to Dr. Adam Kramer at St. John's on his own. He eventually went to Brian V. Curtis, M.D., who performed surgery for a herniated disc in January 2008. Claimant was returned to work at a wire drawing job on May 6, 2008. Claimant testified that he was able to do the job of wire drawer.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on April 23, 2008. Dr. Prostic diagnosed a disc herniation at L4-5 on the right which was caused by the October 25, 2007, accident. Dr. Prostic opined that claimant had sustained an 18 percent permanent partial impairment to the whole body as the result of the injuries suffered on October 25, 2007. The rating was pursuant to the fourth edition of the AMA *Guides*.[5]

On May 22, 2008, claimant suffered a second injury to his low back. Claimant was trying to twist some large diameter rod into a welder to weld and he twisted his back. Claimant felt immediate pain in the left lower back and into his left buttocks and middle back. Claimant reported the accident and was referred to Freeman Occumed in Carthage for medical treatment. There, claimant again came under the treatment of Dr. Haggard. Claimant was given muscle relaxers and placed on light duty. Claimant underwent a functional capacity evaluation (FCE) on June 24, 2008. Based on the FCE, Dr. Haggard had placed permanent work restrictions on claimant, limiting him to lifting no more than 25 pounds and to minimize bending and twisting. When respondent received the results of the FCE and the permanent restrictions, respondent determined that it could no longer meet the restrictions and claimant's employment was terminated. Claimant's last day with respondent was July 3, 2008.

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[4] R.H. Trans., Ex. 6.

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was referred back to Dr. Prostic for a second evaluation on July 15, 2008, pertaining to the accident on May 22, 2008. Claimant was diagnosed with a sustained compression fracture at T9. Dr. Prostic determined that the compression fracture was caused or contributed to by the May 22, 2008, accident. He restricted claimant to lifting weights no greater than 30 pounds occasionally and 10 to 15 pounds frequently, and claimant should avoid more than minimal bending, twisting, lifting, pushing or pulling. Claimant was rated at an additional 5 percent permanent partial impairment to the whole body as the result of the May 22, 2008, accident, with the rating being pursuant to the fourth edition of the AMA *Guides*.[6]

Claimant was referred by his attorney to vocational expert Karen Terrill. Ms. Terrill generated a task list showing the tasks claimant had performed over the previous 15 years. In reviewing the task list, Dr. Prostic determined that claimant had lost the ability to perform 15 of the 24 tasks on the list. This results in a task loss of 62 percent. Claimant has looked for work, but has not found employment since last working for respondent on July 3, 2008.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[7]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

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[6] AMA *Guides* (4th ed.).

[7] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[9] K.S.A. 2007 Supp. 44-501(a).

The contract is "made" when and where the last necessary act for its function is done.[10] When that last necessary act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.[11]

The Kansas Workers Compensation Act applies to injuries sustained outside the state of Kansas where (1) the principal place of employment is within the state; or (2) the contact of employment was made within the state, unless such contract specifies otherwise.[12]

The Board must first determine whether there is jurisdiction under the Kansas Workers Compensation Act to determine this matter. Claimant argues that Kansas has jurisdiction over this claim under K.S.A. 44-506 because the last act necessary to create the employment contract between him and respondent occurred during his conversation with respondent while claimant was in Baxter Springs, Kansas. Respondent disputes that the contract was created while claimant was in Kansas. Claimant filled out the application while in Carthage, Missouri, participated in a job interview, submitted to a drug test, participated in a pre-employment physical, went through orientation and filled out employment papers, all in Missouri. Additionally, respondent's plant manager, Terry White, testified that the person who would have made the phone call to claimant about the drug test and physical examination results, Debbie Wooldridge, was the benefits coordinator for respondent, and she did not have the authority to hire or fire employees. There is also a dispute between claimant and Mr. White as to whether a tentative offer of employment would have been made during the initial job interview in Carthage, Missouri. Claimant alleges that he was offered the job at that time, but refused. Claimant later recanted this testimony. Mr. White testified that if an applicant refuses an offered job, the drug test would not be scheduled as it was expensive to test for drugs and he would not waste the money on an uninterested applicant.

The Kansas Court of Appeals recently addressed this issue in *Speer.*[13] In *Speer*, the claimant expressed a desire to work for Sammons as a truck driver. However, the claimant had to first go to Sammons' office in Houston, Texas, to go through orientation and be cleared to drive. Claimant underwent a drug screening, orientation and driver certification in Houston. Speer was originally driving for Bob Wilbur, the owner and operator of the semi-truck which claimant was to drive. The rig was leased to Sammons.

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[10] *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

[11] *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts, § 64, Comment c (1974); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

[12] K.S.A. 44-506.

[13] *Speer v. Sammons Trucking*, 35 Kan. Ap. 2d 132, 128 P.3d 984 (2006).

When Mr. Wilbur died, claimant expressed an interest in continuing to drive for Sammons. However, Speer requested several changes in the employment relationship, including a company truck, higher pay, benefits and seniority credit. Speer was required to go to Montana, where he again completed orientation, signed paperwork, took another drug test and picked up his company truck. The Board determined that Speer had entered into a new contract with Sammons after Mr. Wilbur died. That contract was finalized while Speer was in Montana, not Kansas. The Court of Appeals affirmed the Board's finding that the employment contract was finalized in Montana and that Kansas had no jurisdiction over claimant's injuries.

Here, the Board finds claimant's situation to be factually similar to *Speer*. Claimant filled out all paperwork in Missouri, and underwent a job interview, drug test, physical examination and orientation while in Missouri. The only act occurring while claimant was in Kansas was a telephone call advising claimant that he had passed the drug test and physical. And that phone call was placed by an employee of respondent who did not have the authority to hire or fire. The Board finds that the last act necessary to finalize this contract occurred in Missouri. Therefore, there is no jurisdiction under the Kansas Workers Compensation Act to decide this matter.

Claimant also contends that a new contract was created in 2007, when he was laid off from respondent. However, claimant was only gone for a few days, the documents tied to that layoff specified that it was a temporary layoff only and the employees were paid their regular insurance benefits during the time they were off. Finally, when claimant was called back, he was not required to go through an interview or job orientation, take a drug test or physical examination, or fill out any paperwork. Claimant was simply called and advised to report to work, which he did. This was not a termination and rehire as alleged by claimant. It was simply a brief layoff with a call-back.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed as there is no jurisdiction under the Kansas Workers Compensation Act to decide this matter. The contract was created in Missouri, claimant was injured in Missouri, and respondent's place of business was in Missouri. Benefits under the Kansas Workers Compensation Act are denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 3, 2009, should be, and is hereby, reversed as claimant failed to prove that his accidents occurring on

October 25, 2007, and May 22, 2008, are subject to the Kansas Workers Compensation Act. The Board does not have jurisdiction over these matters.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Phillip D. Greathouse, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge